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HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 125.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

PETITIONER'S REPLY BRIEF.

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The Boiler Inspection Act, under which this action was brought, is a part of what is considered the "Safety Appliance Acts," and is to be construed as being in Pari Materia with the Federal Employers' Liability Act.

The Court in McCarthy v. Pa. Ry. Co., 156 F. 2d 877 at 879, noted this in regard to a violation of Section 23 of Chapter 45, U. S. C. A., in stating that the acts are in Pari Materia and must be construed together.

This is noted because respondent in its brief at page 2 would attempt to imply that a different situation exists.

Respondent states that the state law of practice and procedure governs an action under these acts, when such an action is instituted in a state court.

Under this contention it contends the appellate court had the power, despite the federal rule to the contrary, to apply the state statute [Paragraph 216 (3) (b) of Chapter 110 of Illinois Revised Statutes] granting such appellate court the right to hold a verdict against the manifest weight of the evidence.

In a state court, respondent contends, in actions under Federal Acts, the parties are bound by state rules of procedure and practice and this, despite Federal holdings to the contrary, or the fact, that the application of such practice or procedure (as in the case at bar) results in the deprivation of a litigant's rights granted him by such Federal Acts.

We think it is apparent without the citation of any authority that this could not conceivably be the law. Because if it were, this would permit each and every state forum to enact practice and procedure rules of a substantive nature contrary to federal law and practice and thereby deprive the Federal Courts of not only their right to control Federal statutory actions in state courts, but also permit chaos to reign in the multitude of state courts with their various conflicting procedures.

It has already been pointed out in the petition herein that under the acts in question the right to trial by jury is part and parcel of the acts and that appellate courts may not interfere, once they have determined that a case has been presented, with such jury's verdict, by holding same against the weight of the evidence or by substituting

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some theory of their own in lieu of that reached by the jury.

This right petitioner had in the Illinois State Forum, and this right has been denied him by virtue of a state procedural statute of a substantive nature which was applied to his action but which admittedly is contrary to the Federal law governing the same situation.

What then is the true rule concerning the application of state rules of practice and procedure in Federal statutory actions instituted in state courts?

The true rule seems to be that state rules of practice and procedure are only applicable to Federal statutory actions in state courts, when such rules do not deprive a litigant of a substantive right guaranteed by the Federal Statute or by its construction by Federal Courts.

This Court has recognized this rule in the case of Atlantic Coast Line Railroad v. Mims, 37 Sup. Ct. 188 at 190, and the Supreme Court of Illinois likewise is aware of it, although it failed to apply it in the instant case.

In Brant v. Chicago & Alton R. R. Co., 294 Ill. 606 at 616, the Supreme Court of Illinois in speaking of the Mims case, supra, said:

> "That court recognizes the doctrine that a substantive Federal right or defense duly asserted cannot be lessened or destroyed by a State rule of practice, • • •."

This Court has repeatedly held, not only by specifically denying an appellate court the right to hold a case against the manifest weight of the evidence where a submissible case is presented, as noted by the authorities in the petition but also that the question of the **kind** or **amount** of the evidence essential to recovery is a Federal and not a state question.

In Chicago, Milwaukee & St. Paul Railway Co. v. Coogan, 70 L. Ed. 1041 at 1044, 271 U. S. 473, this Court in speaking of the negligence required to prove a case under the act, said:

> "The **kind** or **amount** of evidence required to establish it is not subject to the control of the states."

Likewise this Court, the inferior Federal Courts, and various state courts, have repeatedly held that where there is a conflict between state and Federal authority in regard to law, procedure or practice as affecting substantive rights under the act, the Federal law prevails.

In the recent case of South Buffalo Ry. Co. v. Ahern, 344 U. S. 367, 97 L. Ed. 395, at page 401 of the Lawyers' Edition, this Court said:

> "We do not doubt that the Federal Employers' Liability Act, supplanting a patchwork of state legislation with a nationwide uniform system of liberal remedial rules, displaces any state law trenching on the province of the act. State Legislatures, for example, may not intrude into the federal act interstate commerce perimeter to destroy uniformity by arbitrarily presuming the renunciation of rights which the act confers, * * *."

In Buffo v. Baltimore & O. R. Co., 304 Pa. 437, 72 A. 2d 593, in speaking of an action under the act, the Supreme Court of Pennsylvania, at page 593, said:

> "But the interpretation of the act and its application to the facts of any particular case, in order to ascertain whether the plaintiff has been denied a right granted by Congress is ruled by the decision of the United States Supreme Court. (Citing authority.) Rights of recovery authorized by Federal law may not be defeated either by State law or practice. Davis, Director General of Railroads, etc., v. Wechsler, 263 U. S. 22, 24, 44 S. Ct. 13, 68 L. Ed. 143; Brown v. Western Railway of Alabama, supra."

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As was stated in Whitmarsh v. Pa. R. Co., 61 Federal Supp. 850, the question of proof necessary for judgment is a matter of substance and is governed by Federal law. The Court at page 852 said on this point:

> "Moreover, this requirement of uniformity extends to the **type of proof necessary for judgment** for this question of burden of proof is a matter of substance. New Orleans & Northeastern R. Co. v. Harris, 1918, 247 U. S. 367, 371, 38 S. Ct. 536, 62 L. Ed. 1167. See Garrett v. Moore-McCormack Co., 1942, 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239." (Emphasis ours.)

In Davis v. Midland Valley Ry. Co., 153 Pac. 2d 823 (Okla.), the Oklahoma Court, in referring to an action under the act, at page 824 said:

> "It is well settled that when an action comes within the provisions of the Federal Employers' Liability Act, supra, it is governed thereby irrespective of **constitutional or statutory provisions to the contrary.** (Citing authority.)"

This Court in Dice v. Akron C. & Y. R. Co., 96 L. Ed. 398, 342 U. S. 359, at 361, very succinctly stated the evident reason behind these holdings, saying:

> "Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were entitled to have the final say as to what defenses could and could not be interposed by suits under the act."

Respondent's counsel contends the Federal Rule and the State Rule of Illinois are the same and that in a federal court the reviewing court has the authority to hold a case against the manifest weight of the evidence. It cites several cases in which new trials have been granted in cases under the acts. **It cites no case in which a Federal Em-**

ployers' Liability or Safety Appliance Act case in the Federal Court resulted in a holding that a new trial should be awarded by reason of a verdict being against the manifest weight of the evidence. This in itself should be proof that no such power exists as the Federal Reports are rife with cases under the act.

True, in other types of cases, such liberty is allowed and respondent has cited some of these. In fact, at page 13, it cites the case of Charles v. Norfolk and Western Ry. Co., 188 F. 2nd 691, which by virtue of its title might be inferred to be an action under the act. However, upon reading this case it is found it involves an action by a negro passenger for assault and battery, etc., against the railway.

The correct rule in cases under the acts in question is noted in petitioner's brief. That is, that the right to a jury trial is part and parcel of the act, and to permit judges upon appeal to interfere with verdicts because they feel a different result should have been reached or that upon weighing the evidence a different determination should follow is a deprivation of this guarantee and should not be tolerated.

The Federal Court, in Henwood, Trustee of St. Louis Southwestern Ry. Co., v. Chaney, 156 Fed. 2nd 392, very concisely stated this doctrine in saying at 398:

> "The appellant in its brief presents argument relating to the testimony of plaintiff's witnesses and to **weight of evidence** and credibility of witnesses. But the jury has passed on these questions and we are bound by its decision. Tennant, Adm., v. Peoria & Pekin Union Ry. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520." (Emphasis ours.)

Respondent contends that petitioner, by striking out the order granting the new trial, acquiesced and assented

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to the procedural law of Illinois as applicable and thereby is estopped from denying its applicability. (See page 12 of respondent's brief.)

This is utterly naive; rather than acquiescence, petitioner's conduct was one of a denial of the appellate court's right to grant a new trial. Petitioner forced the appellate court to enter a final appealable judgment and thereby placed himself in a position to appeal ultimately to this court and to raise the questions here presented by his actions. This, rather than being an acquiescence, is an obvious denial of the appellate court's holding by any intelligent interpretation.

Of course, respondent would have been delighted if petitioner had acceded to the new trial order because this was tantamount, in the absence of additional evidence (and in view of the position taken by the Appellate Court of Illinois in construing the evidence before it, a rather considerable amount of additional evidence would have been required) to the termination of petitioner's action and would have resulted in a final victory for respondent.

The respondent makes no challenge as to the veracity of the facts noted in petitioner's petition in this cause whereby the appellate court held the case against the manifest weight of the evidence; nor does it attempt, in any way, to justify the court's action in the result it reached in so weighing the evidence. Under the applicable law as cited in petitioner's brief, this, of course, was impossible to do.

Rather (at pages 25 and 26 of its brief) respondent states this Court has no authority to review the findings of fact because the Supreme Court of Illinois had no authority to do so by virtue of its statutory limitation.

What has already been said about state rules of practice and procedure where they interfere with the federal law

governing federal statutory actions in state courts is equally applicable here and need not be repeated.

Further the question of whether an action is against the manifest weight of the evidence is one of law as derived from the facts.

Respondent cites no authority and we know of no limitation in cases of this type, whereby this court is estopped to examine the facts to determine whether a party has received a fair trial as guaranteed by federal law in a federal statutory action in a state court.

In conclusion it is interesting to note the confusion that exists in Illinois concerning the state courts' authority regarding the right to hold an action under the acts in question against the manifest weight of the evidence.

The case of Parthun v. Elgin, J. & E. Ry. Co., cited by respondent, and found at 325 Ill. A. 408, 60 N. E. 2d 464, clearly illustrates the erroneous view.

At page 467 and page 468 of the Northeastern Reporter, the Appellate Court of Illinois, for the First District, held that the action being one brought under the act in a state court, the parties were governed by the state rules of procedure concerning its authority to hold a case against the manifest weight of the evidence.

This Court concluded it had the authority to so do by virtue of the Illinois Statute permitting same (the same Statute relied upon by the appellate court in the case at bar) because the suit was brought in a state rather than a federal forum. However, the court there admitted that a different rule existed in the federal courts under the same situation because the suit was there governed by federal authority, saying in distinguishing the federal court cases at page 466 of the Northeastern Reporter:

> "In Tennant v. Pekin Union Railway Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, relied upon by plain-

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tiff, suit was filed in a Federal District Court and the case is, therefore, not applicable."

In the Parthun case, the court at least had the intelligence to appreciate the fact that two different rules were being applied. This is a situation which respondent denies, although it cites this same language from the Parthun case at pages 10 and 11 of its brief, and one which the Appellate Court of Illinois, likewise, in the case at bar denied when it attempted to reconcile, in its additional opinion filed in petitioner's case, the holdings of the federal court and that of its own in the case at bar.

What the courts in the Parthun case failed to realize was, that state rules of procedure are not applicable where they affect substantive rights as has already been herein indicated.

Then we have in Illinois the correct view in this situation as enunciated in Nickell v. Baltimore & Ohio R. Co., 106 N. E. 2d 738, 347 App. 202, and in Grosse v. Terminal Ry. Ass'n of St. Louis, 307 Ill. App. 414, 29 N. E. 2d 1018, at 1022, wherein the Appellate Court of Illinois for the Fourth District held in cases under the acts, that the question of manifest weight of the evidence was not before the reviewing court under the controlling federal law. (See quotations from these cases at page 18 of petitioner's writ herein.)

One other case is interesting in this regard. This also cited by respondent (page 11 of its brief). This is the case of Mitchell v. L. & N. Ry. Co., 375 Ill. 545, 31 N. E. 2d 965, wherein the Supreme Court of Illinois reversed and remanded to the Appellate Court for the Fourth District of Illinois, an action under the act with general language to the effect that the Appellate Court could weigh the evidence.

However, when the Appellate Court received the case back and reviewed it after reversal (310 Ill. App. 563, 35 N. E. 2d 81), it didn't take the general language of the Supreme Court (which would ordinarily have been correct had not the case been under the Federal Employers' Act) literally, but rather applied the correct rule concerning its right to weigh the evidence and said, after conceding it was governed by the federal law in regard to the contention that the verdict was against the manifest weight of the evidence, at page 86 of the Northeastern Reporter:

> "The federal courts have held that the fact that the verdict and the judgment are against the weight of the evidence, are not for the determination of an appellate court." (Citing authority.)

This, the same Appellate Court which held it had such authority in the case at bar.

This hopeless inconsistency in Illinois decisions and the fact that in the instant case the Court followed the incorrect rule makes manifest the need for certiorari.

Not only is the writ warranted for these causes, but also because the Appellate Court here admittedly searched the record to hold adversely to petitioner. Respondent has not even attempted to answer this point, but only erroneously contends that this Court cannot review it.

Justice to petitioner and the need for uniformity in Federal statutory actions compels the issuance of a Writ of Certiorari in the case at bar.

Respectfully submitted,

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